Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States
October Term, 1996

Duncan Aircraft Sales of Florida, Inc.,

Petitioner,

vs.

Phillip R. and Edna Cappello,
Individually, and Phillip R. Cappello
as Administrator of the Estate of
Kirk P. Cappello,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the federal aviation regulations which give pilots responsibility for safety of aircraft alleviate any concurrent responsibility of air traffic controllers to assist pilots operating under visual flight rules with terrain avoidance.

RULE 29.1 LIST OF PARTIES

Petitioner Duncan Aircraft Sales of Florida, Inc., has the following parent companies or subsidiaries within the meaning of Supreme Court Rule 29.1:

None.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.1 LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS AND JUDGMENTS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 6

ARGUMENT 9

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Biles v. United States,
848 F.2d 661 (5th Cir. 1988) 14

Cappello v. Duncan Aircraft Sales of Florida, Inc.,
No. 3-92-0214 (M.D. Tenn. Feb. 15, 1994) . . 2

Cappello v. Duncan Aircraft Sales of Florida, Inc.,
79 F.3d 1465 (6th Cir. 1996) 2, 12, 19

Dyer v. United States,
551 F. Supp. 1266 (W.D. Mich. 1982) 15

First of America Bank-Cent. v. United States,
639 F. Supp. 446 (W.D. Mich. 1986) . . . 10, 17

Frutin v. Dryvit Systems, Inc.,
760 F. Supp. 234 (D. Mass. 1991) 17

Furumizo v. United States,
245 F. Supp. 981 (D. Haw. 1965),
aff'd, 381 F.2d 965 (9th Cir. 1967) 16

In re Greenwood Air Crash,
924 F. Supp. 1518 (S.D. Ind. 1995) . 13, 18, 19

Himmler v. United States,
474 F. Supp. 914 (E.D. Pa. 1979) 10, 11, 15, 16

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 11

Kack v. United States, 570 F.2d 754 (8th Cir. 1978) . 14

Martin v. United States,
586 F.2d 1206 (8th Cir. 1978) 16

Mattschei v. United States,
600 F.2d 205 (9th Cir. 1979) 13, 17

Pierce v. United States,
600 F.2d 617 (6th Cir. 1982) 11

Redhead v. United States,
686 F.2d 178 (3d Cir. 1982), *cert.*
denied, 459 U.S. 1203 (1983) 12, 17

Rodriquez v. United States,
823 F.2d 735 (3d Cir. 1987) 15

Rudelson v. United States,
602 F.2d 1326 (9th Cir. 1979) 13, 14

Todd v. United States,
384 F. Supp. 1284 (M.D. Fla. 1975),
aff'd, 553 F.2d 384 (5th Cir. 1977) 14

Schuler v. United States,
868 F.2d 195 (6th Cir. 1989) 15

Thurston v. United States, 888 F.Supp. 1100
(D. Utah 1995) 15

Webb v. United States,
840 F. Supp. 1484 (D. Utah 1994) 18

Statutes and Regulations

28 U.S.C.A. § 1254(1) (West 1993) 2

28 U.S.C.A. § 1332 (West 1993) 2

Federal Aviation Act of 1958, 49 U.S.C.A.
§§ 40101-49104 (West Supp. 1996) 10

49 U.S.C.A. § 40101 (West Supp. 1996) 3, 9, 10

49 U.S.C.A. § 40103 (West Supp. 1996) 3, 11

14 C.F.R. §§ 61.1 - 61.201 (1996) 15

14 C.F.R. §§ 91.1 - 91.193 (1996) 15

14 C.F.R. § 91.3 (1996) 5, 16

14 C.F.R. § 91.103 (1996) 5, 16

Federal Aviation Admin., U.S. Dep't of Transp.,
Order No. 7110.65J,
Air Traffic Control (1995) . . 4, 5, 10, 11, 15, 16

Federal Aviation Admin., U.S. Dep't of Transp.,
Order No. 7110.65G,
Air Traffic Control (1992) 18

Federal Aviation Admin., U.S. Dep't of Transp.,
Order No. 7220.2A
Air Traffic Control 19

Other Authorities

Crew Unsure of Position on Approach to Cali, Aviation Wk. & Space Tech., May 13, 1996 20

Andrew J. Dilk, *Aviation Tort Litigation Against the United States—Judicial Inroads Into the Pilot-In-Command Concept*, 52 J. Air L. & Comm. 797 (1987) 13

Federal Aviation Admin., U.S. Dep't of Transp., Aeronautical Information Manual (1995) . 17, 18

Jim Glab, *The FAA Under Siege*, Frequent Flyer, August 1996 9

Elizabeth Gleick, *Can We Ever Trust the FAA? In the ValuJet Aftermath, it is Under Pressure to Make Safety its First and Only Mission, But it is Understaffed and Underfunded*, Time, July 1, 1996 9

John Hoff, *Legally Speaking: Who's Responsible*, IFR Magazine, June 1996 12

House Bill Would Make Safety FAA's Top Job, Air Safety Wk., July 22, 1996 9

Industry Moving to Defeat CFIT Accidents, Air Safety Wk., April 29, 1996 20

Edward H. Phillips, *Multiple Errors Linked to Brown Crash*, Aviation Wk. & Space Tech., June 17, 1996 20

Statement of David Hinson on the Nation's Air Traffic Control System, U.S. Dept. of Trans. News Release, October 17, 1995 11

Christina Del Valle and Douglas Harbrecht, *Wanted: A New Flight Plan for the FAA,* Bus. Wk., July 1, 1996 9

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as Administrator of the Estate of
Kirk P. Cappello,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

TO THE UNITED STATES SUPREME COURT:

Duncan Aircraft Sales of Florida, Inc., asks this court to issue a writ of certiorari to review the judgment rendered March 27, 1996, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND JUDGMENTS BELOW

Petitioner has reproduced in a separate appendix the opinions and judgments which the courts below have issued. The opinions and judgments are as follows:

Cappello v. Duncan Aircraft Sales of Florida, Inc., 79 F.3d 1465 (6th Cir. 1996) (opinion on appeal from district court).

Cappello v. Duncan Aircraft Sales of Florida, Inc., No. 3-92-0214 (M.D. Tenn. Feb. 15, 1994) (district court judgment).

JURISDICTION

Respondents Phillip and Edna Cappello filed this case against Duncan Aircraft Sales of Florida, Inc., in a Tennessee state court, alleging claims for negligence under state law. Duncan Aircraft removed the case to a United States district court, and that court's jurisdiction was based on diversity of citizenship, pursuant to 28 U.S.C.A. § 1332 (West 1993).

The court of appeals issued its opinion and judgment on March 27, 1996. On June 3, 1996, that court denied the petition for rehearing which Duncan Aircraft filed. This Court's jurisdiction to review the court of appeals' judgment arises from 28 U.S.C.A. § 1254(1) (West 1993).

STATUTES & REGULATIONS INVOLVED

49 U.S.C.A. § 40101 (d) (West Supp. 1996):

Safety considerations in public interest.—In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

> (1) regulating air commerce in a way that best promotes its development and safety and fulfills national defense requirements.
>
> . . .
>
> (3) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations.

49 U.S.C.A. § 40103 (b) (West Supp. 1996):

> Use of airspace.—
>
> (1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.
>
> (2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for —

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

Federal Aviation Admin., U.S. Dep't of Transp., Order No. 7110.65J, Air Traffic Control § 2-1-2 (1995):

a. Give first priority to separating aircraft and issuing safety alerts as required in this order. Good judgment shall be used in prioritizing all other provisions of this order based on the requirements of the situation at hand.

. . .

Note. — Because there are many variables involved, it is virtually impossible to develop a standard list of duty priorities that would apply uniformly to every conceivable situation. Each set of circumstances must be evaluated on its own merit, and when more than one action is required, the controller shall exercise his best judgment based on the facts and circumstances known to him. That action which is most critical from a safety standpoint is performed first.

Federal Aviation Admin., U.S. Dep't of Transp., Order No. 7110.65J, Air Traffic Control § 2-1-6 (1995):

Issue a safety alert to an aircraft if you are aware the aircraft is in a position/altitude which, in your judgment, places it in unsafe proximity to terrain, obstructions, or other aircraft. Once the pilot informs you action is being taken to resolve the situation, you may discontinue the issuance of further alerts. Do not assume that because someone else has responsibility for the aircraft that the unsafe situation has been observed and the safety alert issued; inform the appropriate controller.

Note 1 — The issuance of a safety alert is a first priority (see paragraph 2-1-2) once the controller observes and recognizes a situation of unsafe aircraft proximity to terrain, obstacles, or other aircraft. Conditions, such as workload, traffic volume, the quality/limitations of the radar system, and the available lead time to react are factors in determining whether it is reasonable for the controller to observe and recognize such situations. While a controller cannot see immediately the development of every situation where a safety alert must be issued, the controller must remain vigilant for such situations and issue a safety alert when the situation is recognized.

14 C.F.R. § 91.3(a) (1996): The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

14 C.F.R. § 91.103 (1996): Preflight action. Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight.

STATEMENT OF THE CASE[1]

On March 16, 1991, at approximately 1:42 in the morning, a private jet carrying country singer Reba McEntire's tour band crashed into a mountain near San Diego shortly after take-off. All nine people on board the jet were killed, including band leader Kirk Cappello.

Petitioner Duncan Aircraft Sales of Florida, Inc. had provided the jet and the pilot, Donald Holmes. Earlier that evening, Holmes had filed a flight plan indicating that he intended to fly the aircraft under instrument flight rules ("IFR") to Ft. Wayne, Indiana. However, the band was not ready to leave until well after 1:00 in the morning, and by that time Holmes could not obtain an IFR clearance from the airport's control tower because it was closed. Holmes thus decided to take off under visual flight rules ("VFR") and, once in the air, to obtain his IFR clearance from the air traffic controller in San Diego.

Immediately following take-off, Holmes contacted air traffic controller Jim Hughes, the only controller on duty at that time of night, and asked for his IFR clearance. Unknown to Holmes, the Federal Aviation Administration's ("FAA") computer system had cancelled his flight plan pursuant to local FAA procedures. However, all of the information on Holmes' flight plan was available on a strip in front of controller Hughes (III Tr. 693-94). Despite knowing that the aircraft was already airborne, Hughes

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[1] Except where record references show otherwise, these facts are drawn from the court of appeals' opinion. However, Duncan Aircraft does not agree with, and the record does not support, all facts as stated in that opinion.

refused to issue an immediate IFR clearance to Holmes, choosing instead to first reenter the flight plan into the computer. This data entry procedure required Hughes to turn around and face the computer console, and so while he was performing this minor administrative task he had his back to the radar screen.

At 1:42:16 a.m. Hughes interrupted his typing to radio Holmes, give him his aircraft's identification code—known as a "beacon code" or "squawk"—and instruct him to confirm his position by pushing his transponder's "ident" button. Holmes responded at 1:42:19, informing controller Hughes that he was dialing the squawk into the transponder on the aircraft.

Although Hughes saw the aircraft on the radar screen when Holmes contacted him immediately after take-off (III Tr. 714), Hughes did not check the screen to verify the aircraft's position, direction and altitude after issuing the transponder code. Instead, Hughes returned to the computer and continued retyping the flight plan. Thus, when Holmes' aircraft crashed into Otay Mountain, Hughes still had his back turned on the radar screen.

Missouri residents Phillip and Edna Cappello filed a wrongful death action in a Tennessee state court. The three defendants, residents of Texas, Pennsylvania, and Georgia, removed the case to the federal district court. The Cappellos then added Florida resident Duncan Aircraft as a defendant and dismissed the original defendants.

The parties tried the case to a jury, which was asked to apportion liability among Duncan Aircraft, Hughes, and an FAA flight service specialist named Kessock. The jury found that all three were negligent, that their negligence

proximately caused the crash, and that responsibility should be apportioned 45 percent to Duncan Aircraft, 27.5 percent to Hughes, and 27.5 percent to Kessock. The jury awarded compensatory damages in the sum of $732,829, and the district court rendered judgment on the verdict. The Cappellos appealed.

The court of appeals reversed the judgment. It ruled that the district court had erred in asking the jury to apportion responsibility to FAA employees Hughes and Kessock. The court said that apportionment of responsibility to Hughes was error because a pilot flying under visual flight rules is not under the direction or control of air traffic controllers and thus has "sole responsibility to maintain eye contact with the ground and to avoid obstructions."

The court acknowledged that if Hughes had not turned around to retype the flight plan he would have had time to notice that the aircraft was flying toward mountains at an unsafe altitude. Indeed, from just after take-off until the moment of impact, the aircraft was within Hughes' traffic control sector and was clearly visible on his radar screen. Nevertheless, the court decided that under FAA regulations Hughes' administrative duty to retype Holmes' flight plan outweighed any duties that FAA regulations might otherwise impose on Hughes to watch his radar screen or provide the IFR clearance that Holmes had requested.

Thus, the court of appeals concluded that "[t]he legal fault here is solely the defendant's, under the doctrine of respondeat superior." The court set aside the jury's findings as to the responsibility of FAA employees Hughes and Kessock, set aside the damages award based on a challenge to the expert damages testimony that Duncan Aircraft had offered, and remanded the case for a trial on damages only.

ARGUMENT

Congress has charged the Federal Aviation Administration with promotion of aviation and aviation safety. 49 U.S.C.A. § 40101 (West Supp. 1996). Despite this dual mandate, the agency's "mission is really safety." *House Bill Would Make Safety FAA's Top Job*, Air Safety Wk., July 22, 1996 (quoting Senate Commerce Committee aid). Recent public investigations of aviation accidents, however, have revealed that the FAA has failed to put "safety first." *E.g.*, Christina Del Valle and Douglas Harbrecht, *Wanted: A New Flight Plan for the FAA,* Bus. Wk., July 1, 1996, at 39 (noting the FAA's rejection of numerous safety proposals because "the changes would be too costly for airlines and aircraft manufacturers"); Elizabeth Gleick, *Can We Ever Trust the FAA? In the ValuJet Aftermath, it is Under Pressure to Make Safety its First and Only Mission, But it is Understaffed and Underfunded,* Time, July 1, 1996, at 48 ("FAA has not always moved as decisively as it might on safety matters"); Jim Glab, *The FAA Under Siege,* Frequent Flyer, August 1996, at 37 (discussing FAA's "failure to give safety regulations priority").

In this particular case, the court decided that an air traffic controller could perform a low priority administrative task rather than assume control of an aircraft and ensure its safety, despite the pilot's request for immediate clearance and despite the controller's ready access to information of imminent danger. The court decided that if FAA regulations have imposed "primary responsibility" on VFR pilots to avoid terrain and obstacles, air traffic controllers do not have any concurrent duty to assist such pilots in terrain avoidance.

If a "safety first" policy best implements Congress's intent with regard to the FAA's regulation of aviation in this country, the Sixth Circuit's decision goes the wrong way and sends the opposite message. To the extent the Sixth Circuit's decision has placed FAA air traffic controllers beyond any responsibility for accidents by VFR pilots flying within their sector, the court has struck down a significant incentive for air safety—namely, legal liability.

The court of appeals' conclusion contradicts not only the policy concerns underlying Congressional regulation but also the regulations themselves, as expressed in the federal aviation regulations and the Air Traffic Control Manual. These publications contain the FAA rules, regulations, and procedures applicable to FAA air traffic controllers, and they uniformly insist that air traffic controllers put safety concerns first, even with regard to VFR flights. Thus, the court of appeals' decision contradicts the entire spectrum of legislation and administrative regulation of air traffic. In short, the decision promotes bad policy and is simply wrong.

A. The court's decision contradicts Congressional policy under the Federal Aviation Act of 1958.

The responsibilities of FAA air traffic controllers are governed by the Federal Aviation Act of 1958, 49 U.S.C.A. §§ 40101-49104 (West Supp. 1996); regulations the FAA has promulgated pursuant to the Act (title 14 of the Code of Federal Regulations); and the FAA's Air Traffic Control manual (Federal Aviation Admin., U.S. Dep't of Transp., Order No. 7110.65J, Air Traffic Control (1995) [hereinafter "Air Traffic Control Manual"]). *First of America Bank-Cent. v. United States,* 639 F. Supp. 446, 455 (W.D. Mich 1986); *Himmler v. United States,* 474 F. Supp. 914, 929 (E.D. Pa. 1979).

By means of the Federal Aviation Act, Congress has directed the FAA to develop the navigable airspace and "assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C.A. § 40103(b) (West Supp. 1996). The FAA thus has a duty to prescribe regulations for "navigating, protecting and identifying aircraft." *Id.* § 40103(b)(2)(A). Accordingly, the FAA has promulgated a system of air traffic control that encompasses nearly all of the airspace in the United States.

Air traffic controllers comprise an essential link in the chain of responsibility for air safety. Air traffic control operates twenty-four hours a day, 365 days per year, handling two aircraft per second and moving 1.5 million people per day to their destinations. *Statement of David Hinson on the Nation's Air Traffic Control System,* U.S. Dept. of Transp. News Release, Oct. 17, 1995, 1995 WL 614511. It is virtually impossible to fly an aircraft within the United States without coming into contact with the FAA's air traffic control system. Having undertaken to promote safe air travel, the government owes the pilots and passengers who rely on it a duty to perform its obligations with due care. *See Indian Towing Co. v. United States,* 350 U.S. 61, 64-65 (1955); *Pierce v. United States,* 600 F.2d 617, 621 (6th Cir. 1982).

As is illustrated by this case, in an air traffic control room it is always possible that a tragic accident may occur "in a matter of seconds if controllers who assume a high responsibility relax from constantly overseeing an aircraft to promote safety of flight." *Himmler,* 474 F. Supp. at 928. Accordingly, air traffic controllers must "give first priority to separating aircraft and issuing safety alerts." Air Traffic Control Manual § 2-1-2. In this case, if controller Hughes

had given safety concerns first priority, the aircraft would have passed thousands of feet above Otay mountain and nine fatalities would have been averted.

Nevertheless, the court held that Hughes was not negligent when he turned his back on his radar screen in order to complete a minor administrative task. In essence, the court said that controllers may, without fear of repercussion, disregard the safety of VFR aircraft in their sector; until Air Traffic Control provides an IFR clearance, the pilot alone must bear the burden of ensuring the safety of his or her passengers. This, apparently, is how the general public views the court's decision. *See* John Scott Hoff, *Legally Speaking: Who's Responsible,* IFR Magazine, June 1996, at 21 (reviewing the *Cappello* decision and noting that the Sixth Circuit put "full and total responsibility on the shoulders of the pilot").

The judiciary should not be so quick to relieve air traffic controllers of their safety responsibilities. On the contrary, the safety of air travelers demands that controllers be held to a high standard of care. *Redhead v. United States,* 686 F.2d 178, 189 (3d Cir. 1982) (Becker, J. dissenting), *cert. denied*, 459 U.S. 1203 (1983). Rather than insisting that the FAA maintain this standard of care, the court below has condoned FAA decisions to put safety second, not first.

B. The case involves a question of law which is unsettled and requires resolution by this Court.

The various decisions among the circuits on the issues in this case cannot be construed as articulating a coherent rule of law. Courts generally agree that the duties of air traffic controllers are delineated by federal law. They have not been able to agree, however, as to exactly how the obli-

gations of air traffic controllers relate to the duties of the pilot-in-command, particularly when the pilot is operating under visual flight rules. *See* Andrew J. Dilk, *Aviation Tort Litigation Against the United States—Judicial Inroads Into the Pilot-In-Command Concept*, 52 J. Air. L. & Comm. 797, 805 (1987).

The decisions among the circuits essentially reveal two conflicting philosophies. The first holds that air traffic controllers and pilots have concurrent obligations to prevent harm, whether the aircraft is operating under VFR or IFR conditions. Under this majority view the pilot and controller have concurrent, overlapping responsibility to exercise due care to avoid accidents. *See In re Greenwood Air Crash,* 924 F. Supp. 1518, 1538 (S.D. Ind. 1995) (citing *Mattschei v. United States*, 600 F.2d 205, 208 (9th Cir. 1979)).

In *Greenwood,* the pilot filed an IFR flight plan and then departed VFR to pick up his IFR clearance enroute, just as pilot Holmes did in this case. 924 F. Supp. at 1526. After the plane appeared on FAA radar, it collided with a another aircraft which was also operating VFR. The court held that because the air traffic controller could see both aircraft on his radar scope, he had a duty to direct his attention to the scope and issue a warning to prevent the collision. The court noted that if the controller had scanned his radar scope at the time of the pilot's initial radio contact, he would have had ample time to observe the situation and issue a warning. The controller's "inattention to his radar scope" and his "failure to become aware of the unsafe proximity of the aircraft" were negligent. *Id.* at 1533-34.

Similarly, the Ninth Circuit has recognized that an air traffic controller has a duty to monitor the position of VFR aircraft and warn of impending danger. *Rudelson v. United*

States, 602 F.2d 1326, 1328 (9th Cir. 1979) (holding that air traffic controller was negligent for failure to monitor and warn VFR pilots of impending midair collision). The court acknowledged that pilots and controllers share a duty of care for the safety of the occupants of aircraft. *Id.* at 1329.

These cases involved collisions with other aircraft rather than with terrain, but they stand for the same general proposition: that pilots' duty to be cognizant of danger does not eliminate controllers' responsibility to watch for and warn of that danger. Furthermore, many courts have also recognized the concurrent duties of air traffic controllers and pilots in situations involving controlled flight into terrain. *See, e.g., Biles v. United States*, 848 F.2d 661, 663 (5th Cir. 1988) (holding that controller was not liable for impact with terrain, but acknowledging that "the controller must assist even careless pilots who, based on the facts known to the controller, have placed themselves in a dangerous position"); *Todd v. United States*, 384 F. Supp. 1284, 1292 (M.D. Fla. 1975) (holding that although the presence of the terrain and the danger it presented should have been equally obvious to the pilot, "Air Traffic Control nevertheless had a duty to warn" the pilot of the presence of a mountain), *aff'd*, 553 F.2d 384 (5th Cir. 1977).

In contrast, the minority position holds that the VFR pilot's primary duty to ensure the safety of the aircraft absolves air traffic controllers of any responsibility for the well-being of the passengers. Courts that adhere to this view hold that controllers have no duty to warn pilots of dangers of which the pilot should be aware. *See, e.g., Kack v. United States*, 570 F.2d 754, 756 (8th Cir. 1978) (holding controller was not liable for crash caused by wake turbulence because the pilot was primarily responsible for the safe operation of the aircraft when VFR, regardless of the traffic clearance);

Schuler v. United States, 868 F.2d 195, 197 (6th Cir. 1989) (holding controller was not negligent for failing to keep the pilot, who was operating with one engine, informed of status of the runway because in VFR conditions the primary responsibility for safe operation of the aircraft remains with the pilot); *Thurston v. United States,* 888 F. Supp. 1100, 1110 (D. Utah 1995) (holding controllers were not negligent in assisting VFR pilot who crashed into mountainous terrain because controllers had no duty to warn pilot of a condition of which the pilot should already have been aware).

These cases reveal that a fundamental confusion exists regarding the relationship between the duties of pilots and the duties of controllers regarding flight safety. In the interest of safety, this Court should clarify the responsibilities of air traffic controllers to air travellers.

C. The court of appeals' decision in this case is wrong.

The court below erred in holding that controller Hughes was not negligent. The court's holding was apparently based on the fundamental misconception that Holmes' duties as a pilot operating under visual flight rules absolved Hughes from any responsibility to Kirk Cappello and the other passengers aboard the aircraft.

The duties of both pilots and air traffic controllers are imposed by federal law. *Rodriquez v. United States,* 823 F.2d 735, 739 (3d Cir. 1987). The duties of controllers are set forth in the FAA's Air Traffic Control Manual. *Dyer v. United States,* 551 F. Supp. 1266, 1275 (W.D. Mich. 1982). The duties of pilots are delineated in the federal aviation regulations. 14 C.F.R. §§ 61.1-.201, 91.1-.193 (1996). These regulations have the force and effect of law. *Himmler,* 474 F. Supp. at 931.

Through the Air Traffic Control Manual, federal law commands that controllers put safety concerns above all other priorities. The manual requires controllers to issue a safety alert to any aircraft if they are aware that the aircraft is within unsafe proximity to the terrain, obstructions or other aircraft, and to remain vigilant for such situations. Air Traffic Control Manual § 2-1-6 & n.1. Controllers must give "first priority to separating aircraft and issuing safety alerts." *Id.* § 2-1-2. The manual instructs that controllers are not to "assume that because someone else has responsibility for the aircraft that the unsafe situation has been observed and the safety alert issued." *Id.* § 2-1-6.

Moreover, several courts have recognized that the operating manuals set the minimum standard for controller responsibilities. *E.g. Martin v. United States,* 586 F.2d 1206, 1210 (8th Cir. 1978); *Himmler v. United States,* 474 F. Supp. 914, 931 (E.D. Pa. 1979); *Furumizo v. United States,* 245 F. Supp. 981 (D. Haw. 1965), *aff'd,* 381 F.2d 965 (9th Cir. 1967). These courts have held that controllers also have a duty, apparently arising under federal common law, to exercise their best judgment in trying to help pilots avoid danger when it is, or should be, obviously imminent. *Himmler,* 474 F. Supp. at 931.

Federal law imposes similar duties on pilots. The federal aviation regulations give the pilot-in-command direct responsibility for, and final authority as to, the operation of the aircraft. 14 C.F.R. § 91.3. Prior to departure, pilots are required to become familiar with all available information concerning a flight. 14 C.F.R. § 91.103. In addition, the Aeronautical Information Manual, which the FAA designed to provide pilots with basic flight information and air traffic control procedures, states that pilots have responsibility to watch out for and avoid obstacles when flying in visual

conditions. Federal Aviation Admin., U.S. Dep't of Transp. Aeronautical Information Manual § 5-5-8(a) (1995).[2]

The Sixth Circuit erroneously viewed as mutually exclusive the federal regulations that govern the responsibilities of pilots and the regulations that govern the duties of air traffic controllers. The regulations that give VFR pilots responsibility for terrain and collision avoidance do not eliminate the controller's responsibility to issue safety alerts. The pilot's primary responsibility for collision avoidance is not equivalent to "sole responsibility," as the court of appeals held in this case. Rather, federal aviation regulations require that pilots and controllers each assume *concurrent* responsibility. *Mattschei v. United States,* 600 F.2d 205, 208 (9th Cir. 1979). Once the pilot contacts the controller by radio, the controller has a responsibility to monitor the position of the aircraft and warn of impending danger. *Frutin v. Dryvit Systems, Inc.*, 760 F. Supp. 234, 236 (D. Mass. 1991). The controller may not shirk his or her responsibility by sitting back and relying on the pilot's adherence to the regulations. *Redhead,* 686 F.2d at 186 (Becker, J., dissenting). As the Aeronautical Information Manual explains:

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[2] The Aeronautical Information Manual was formerly called the "Airman's Information Manual." Unlike the federal regulations, this manual does not have the force and effect of law. Rather, it is only evidence of the standard of care for pilots and controllers. *First of America Bank-Cent. v. United States,* 639 F. Supp. 446, 453 (W.D. Mich. 1986).

> The responsibilities of the pilot and controller intentionally overlap in many areas providing a degree of redundancy. Should one or the other fail in any manner, this overlapping responsibility is expected to compensate, in many cases, for failures that may affect safety.

Aeronautical Information Manual § 5-5-1(e) (1995). Thus, a pilot's negligence does not relieve the air traffic controller of his responsibility. *E.g., Webb v. United States,* 840 F. Supp. 1484, 1511 (D. Utah 1994). Because either or both the air traffic controller's and pilot's negligence may be the proximate cause of an accident, a trier of fact should be allowed to apportion fault if state law otherwise allows. The court of appeals, however, has concluded that, in effect, when a pilot is negligent an air traffic controller cannot be negligent as a matter of law.

Contrary to the lower court's view, whether an aircraft is operating under visual flight rules or instrument flight rules, and whether the pilot is exercising due care or is negligent, federal law requires the controller to remain vigilant for danger and issue all warnings that a reasonable controller would issue under the same circumstances. *See Greenwood,* 724 F. Supp. at 1539. The factors relevant to the determination of what a reasonable controller would do are included in the Air Traffic Control Manual. The factors include: higher priority duties of the controller, radar limitations, traffic volume, frequency congestion, and controller workload. *Id.* (citing Air Traffic Control Manual, FAA Order 7110.65G, ¶¶ 2-6, 2-21 (1992)).

In this case, controller Hughes had no excuse for not monitoring the aircraft and issuing an alert. Hughes did not

have any higher priority duty to attend to during the moments just prior to the fatal accident. This was not a case in which the controller was struggling to manage numerous aircraft; Holmes' airplane was the only aircraft within Hughes' sector at the time of the accident. Hughes' first priority was to ensure the safety of the aircraft's passengers by watching for possibly dangerous situations and issuing any warning that the situationrequired. Instead, he turned his back to the radar screen for at least two minutes in order to perform a secondary task solely for his own convenience.[3] It would have taken Hughes only a moment to ascertain that the plane was in danger and issue warnings that could have prevented the accident. Hughes' "failure to see and realize what was visible and discernable, followed by the failure to give immediate warnings, constitute negligence." *Id.* at 1539.

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[3] The court below erroneously relied on FAA Order 7220.2A § 30-78, which describes the order in which an air traffic controller should proceed when processing "airfiles." *See Cappello,* 79 F.3d at 1473 n.12. Normally, a pilot files his IFR flight plan with a Flight Service Station prior to departure. The pilot then receives his clearance either prior to departure or, as in this case, after departure. An "airfile" occurs when an VFR pilot files an IFR flight plan while in flight, rather than before departure. In such a case, the pilot gives the air traffic controller information for his IFR flight plan after the aircraft is already airborne. The controller must, of course, record this new information prior to issuing the clearance. In this case controller Hughes was not dealing with an airfiled flight plan. There is no dispute that Holmes had filed the flight plan before take-off, and Hughes had the flight plan information on a strip right in front of him.

The court of appeals, however, reasoned that since Hughes was not looking at the radar screen, he had no duty to issue an alert. The court's reasoning misses the point: if Hughes had been fulfilling his priority duty, he would have issued the clearance immediately and the aircraft would never have been in danger — or at the very least Hughes would have been looking at his radar screen and would have seen the potential danger to the aircraft.

The court would apparently modify the Air Traffic Control Manual to read "if you happen to glance at your radar screen, you should issue a safety alert." This is analogous to telling a lifeguard that because he is busy writing down the names of the children in the swimming pool, he does not have to watch those children swim. In the Sixth Circuit, a lifeguard who was completing this administrative task would be absolved from liability for a child's drowning if, under the circumstances, he failed to see the child heading toward deep water.

The dangers giving rise to this case are not unique. Incidents involving "controlled flight into terrain" have become a serious, yet avoidable, problem. *See, e.g., Crew Unsure of Position on Approach to Cali*, Aviation Week & Space Technology, May 13, 1996, at 52; Edward Phillips, *Multiple Errors Linked to Brown Crash*, Aviation Wk & Space Tech., June 17, 1996, at 71. Controlled flight into terrain has been the primary cause of aviation accidents in the last ten years, accounting for 971 fatalities between 1991 and 1995. *See Industry Moving to Defeat CFIT Accidents,* Air Safety Wk., April 29, 1996, at 1. Competent air traffic control radar service is one factor that can help reduce these accidents. *See id.* at 3. In order to fulfill this obligation, however, the FAA must maintain a commitment to put safety first. The judiciary must insist that it does.

CONCLUSION

For these reasons, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States
October Term, 1996

Duncan Aircraft Sales of Florida, Inc.,

Petitioner,

vs.

Phillip R. and Edna Cappello, Individually,
and Phillip R. Cappello as Administrator
of the Estate of Kirk P. Cappello,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

Appendix to
Petition for Writ of Certiorari

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36 pp

TABLE OF CONTENTS

Cappello v. Duncan Aircraft Sales of Florida, Inc., 79 F.3d 1465 (6th Cir. 1996) (opinion by court of appeals) 1

Cappello v. Duncan Aircraft Sales of Florida, Inc., No. 3-92-0214 (M.D. Tenn. Feb. 15, 1994) (judgment of the district court) 29

Cappello v. Duncan Aircraft Sales of Florida, Inc., No. 94-5543 (6th Cir. June 3, 1996) (order on petition for rehearing) 33

No. 94-5543

United States Court of Appeals
for the Sixth Circuit

Phillip R. and Edna Cappello,
Individually, and Phillip R. Cappello as
Administrator of the Estate of Kirk P.
Cappello,

Plaintiffs-Appellants,

v.

Duncan Aircraft Sales of Florida, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and Filed March 27, 1996

Before: MERRITT, Chief Judge; MARTIN, Circuit Judge; SIMPSON, Chief District Judge.*

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*The Honorable Charles R. Simpson, III, Chief United States District Judge for the Western District of Kentucky, sitting by designation.

MERRITT, Chief Judge. This diversity case for wrongful death arises from an airplane crash. The parties agreed that the substantive questions in the case are governed by Tennessee law.

At 1:42 in the early morning of March 16, 1991, in fair weather, the pilot of a small "Hawker" jet chartered from the defendant flew into the side of a 3,500 mountain two minutes after taking off from a closed airport in San Diego. All nine people on board were killed. The pilot, Donald Holmes, had chosen to take off at night in a mountainous area under the visual flight rules ("VFR") of the Federal Aviation Administration, rather than the instrument flight rules ("IFR"). Federal Aviation Administration General Operating and Flight Rules, 14 C.F.R. §§ 91.151-91.159 (Visual Flight Rules) and 14 C.F.R. §§ 91.167-91.193 (Instrument Flight Rules) (1995). He was therefore not under the direction or control of an FAA controller, and consequently, he had received no radio instructions or clearances before the crash. Under these circumstances of VFR flight, as explained in more detail below, the pilot in command had the sole responsibility to maintain eye contact with the ground and to avoid obstructions. 14 C.F.R. § 91.3 ("The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."); 14 C.F.R. § 91.13 ("No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."); December 13, 1990, Airman's Information Manual Rule 407(a) ("When meteorological conditions permit, regardless of type of flight plan or whether or not under the control of a radar facility, the pilot is responsible to see and avoid other traffic, terrain, or obstacles.") and Rule 325(b)(5)(a) ("When climbing in visual conditions it is the pilot's responsibility to see and avoid obstacles."). The defendant corporation, Duncan Aviation,

had chartered the plane and provided the pilot in order to carry a band for country music singer, Reba McEntire, to her next concert engagement. The plaintiffs' decedent in this wrongful death action was the band leader, Kirk Cappello.

Able counsel for the defendant declined to admit that pilot negligence was the cause of the accident and sought successfully at the jury trial below to shift responsibility to two nonparty FAA employees on the basis of comparative negligence. The plaintiffs, the parents of the deceased band leader, assign as error on appeal the decision of the trial judge to allow this comparative negligence defense to go to the jury. The jury found the pilot who flew into the mountain only 45% responsible, attributing 55% of the responsibility for the crash to the FAA employees. After the deduction for FAA negligence, the jury awarded plaintiffs $329,773 in damages against defendant for their son's death.

The plaintiffs also assign as error two other trial decisions of the district court, the decision to grant judgment for the defendant on the question of punitive damages and the comments of the trial judge to the jury advising that in the judge's opinion the plaintiffs' most important expert witness on the issue of the defendant's liability lacked credibility and was not testifying in good faith.

We will consider these trial issues in detail before reviewing the other assignments of error which are in the main related to the damage award.

I. The Issue of the Negligence of the Two FAA Employees

The record discloses that this airplane crash took place under the following circumstances. In San Diego, the main commercial airport, Lindbergh Field, closes at 11:00

P.M. and does not allow airplanes to take off at night thereafter. Airplanes can take off in San Diego late at night from Brown Field, a former Naval air station adjacent to the Mexican border which has been converted into an airport for private planes. The entire airport at Brown, including the control tower, closes early and was not open when the defendant's jet took off with the band at 1:40 A.M. on the morning of March 16, 1991. The record does not disclose why the pilot decided to take off late at night from a closed airport rather than waiting until the next day, nor does it disclose why he chose to take off in the jet at night flying toward a mountainous area under visual flight rules instead of using an instrument departure route. The record does not specifically disclose the pilot's level of physical and mental fatigue, although it does show that he flew the chartered jet from its home base in Alabama arriving in Gallatin, Tennessee, well after midnight the night before. Then for most of the day on March 15, 1991, he flew the plane from Tennessee to San Diego stopping once in between for fuel. The record discloses that the pilot was an experienced and reputable jet pilot with 15,000 hours of total time in many types of airplanes.

It is elementary, and required by FAA rules, that a pilot in such circumstances have detailed aviation VFR and IFR maps for the San Diego area showing the terrain, the location of the Terminal Control Area (TCA)[1] and other

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[1]In the vernacular of pilots, the San Diego metropolitan area has a TCA or Terminal Control Area. For pilots, this acronym carries with it a whole panoply of rules and regulations governing flight. It means that a VFR pilot taking off or landing must stay clear of a large dome of air space over San Diego until an FAA controller has positively

restricted areas, as well as instrument approach and departure routes, radio communication and navigation frequencies, the location of radio and visual navigation aids and checkpoints and the local procedures for filing instrument flight plans and obtaining instrument flight clearances. 14 C.F.R. § 91.503(a) ("The pilot in command of an airplane shall ensure that the following flying equipment and aeronautical charts and data, in current and appropriate form, are accessible for each flight at the pilot station of the airplane: . . . (4) for IFR, VFR over-the-top, or night operations, each pertinent navigational en route, terminal area, and approach and letdown chart.") The FAA rules require that a pilot study the maps and manuals carefully and digest all of the information necessary for safe flight. 14 C.F.R. § 91.103 ("Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight.").

There are detailed sets of assumptions, customs and patterns of conduct shared by pilots and FAA flight assistants, and in the end, the comparative negligence problem in this case is about whether the FAA employees failed to comply properly with this set of shared assumptions and expectations. These assumptions and expectations arise from

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cleared the aircraft into the area by radio, has given the pilot a radar identification code to transmit (a "squawk") and has given the pilot an altitude and direction of flight. Until the pilot who is taking off is "cleared" into the TCA by FAA "departure control," the pilot must remain outside of the dome of airspace defined by the TCA. 14 C.F.R. §§ 91.131-135. These facts and the flight procedures to be employed in and around TCA's are a part of the elementary knowledge of all experienced instrument rated pilots such as the one flying the plane in this case.

hundreds of FAA rules and guidelines covering different flight situations and the customary way they have come to be applied in the flying community. Under FAA rules, all FAA "Flight Specialists" on the ground in so-called "Flight Service Stations," who give pilots weather and other flight information,[2] and all "controllers" who direct pilots in the operation of aircraft under their positive control when underway, are entitled to assume that pilots with whom they communicate have complied with FAA regulations and have studied the basic maps of the area, know the terrain and the navigational facts concerning departure routes, TCA's, clearances and the like. 14 C.F.R. § 91.103; *Redhead v. United States*, 686 F.2d 178, 183 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1203, 103 S. Ct. 1190, 75 L. Ed. 2d 435 (1983); December 13, 1990 Airman's Information Manual Rule 325 (Note) ("The term Radar Contact, when used by the controller during departure, should not be interpreted as relieving pilots of their responsibility to maintain appropriate

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[2]December 13, 1990 Airman's Information Manual Rule 152 ("Services Available to Pilots, Flight Service Stations") states that: FSSs are air traffic facilities which provide pilot briefings, en route communications and VFR search and rescue services, assist lost aircraft and aircraft in emergency situations, relay ATC clearances, originate Notices to Airmen, broadcast aviation weather and NAS information, receive and process IFR flight plans, and monitor NAVAIDS. In addition, at selected locations FSSs provide En Route Flight Advisory Service (Flight Watch), take weather observations, issue airport advisories, and advise Customs and Immigration of transborder flights.

terrain and obstruction clearance.").[3] Rule one makes it clear that the pilot in command, like the ship captain, has the ultimate responsibility for the safety of his plane and his passengers and must comply with the extensive body of regulations published by the FAA. 14 C.F.R. § 91.3; *In re Air Crash Disaster at New Orleans*, 544 F.2d 270, 276 (6th Cir. 1976).

VFR flight is limited to fair weather flying. 14 C.F.R. § 91.155. The pilot under VFR flight rules may not fly through clouds or in weather in which the ceiling is low or the visibility is bad. *Id.* Within this framework, pilots may fly night or day wherever they want so long as they do not fly into restricted areas like TCA's. 14 C.F.R. §§ 91.126-91.135. The VFR pilot need not remain under the "positive control" or guidance of an FAA air controller[4] but must ordinarily maintain visual contact with the ground and

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[3]The Federal Aviation Regulations published in Title 14 of the Code of Federal Regulations have the force and effect of law. *First of America Bank-Central v. United States*, 639 F. Supp. 446, 453 (W.D. Mich. 1986) (citing *Tilley v. United States*, 375 F.2d 678, 680 (4th Cir.1967) and *United States v. Schultetus*, 277 F.2d 322, 327 (5th Cir. 1960)). The Airmen's Information manual "constitutes evidence of the standard of care for all certified pilots in the aviation community." *First of America Bank-Central v. United States*, 639 F. Supp. 446, 453 (W.D. Mich. 1986) (citing *Associated Aviation Underwriters v. United States*, 462 F. Supp. 674, 680 (N.D. Tex. 1978)).

[4]Defendant's expert admitted that the pilot was not "under the control" of a radar facility at the time of the crash. Transcript of Trial, Vol. IV, at 911.

obstructions to flight. Joseph Duncan himself, the President of defendant company Duncan Aircraft Sales of Florida, testified that, " . . . VFR, you don't even have to call anybody. You can just take off and go." Transcript of Trial, Vol. III, at 590.

In contrast, IFR flights are always under the positive control of a controller whether the weather is good or bad, and pilots are dependent on their instruments for navigation. 14 C.F.R. § 91.173 ("ATC clearance and flight plan required. No person may operate an aircraft in controlled airspace under IFR unless that person has (a) Filed an IFR flight plan; and (1,) Received an appropriate ATC clearance."). The 1990 Airman's Information Manual makes it very clear that terrain and obstruction clearance is not provided by Air Traffic Control until the controller begins to provide navigational guidance (i.e. Radar Vectors). Rule 325 (Note). Thus, a critical factor in determining both the duty owed by Kessock and Hughes and whether that duty was breached is that the pilot decided to take off under VFR.

The case of *Biles v. United States*, 848 F.2d 661 (5th Cir. 1988), describes a somewhat similar accident and undertakes to explain a few of the assumptions and expectations that pilots share with FAA assistants. The trial court in Biles refused to allow the question of the controller's negligence to go to the jury, and the Fifth Circuit affirmed. In Biles the pilot of a prop-jet took off VFR from the Chattanooga airport and flew the plane into Lookout Mountain at an altitude of 2,000. The pilot was flying VFR in bad weather. He established contact with and came under the "positive control" of Chattanooga departure control. As is normal for VFR flights, the controller terminated radar services and positive control when the aircraft left the controller's sector of radar surveillance. The controller did not pass the pilot on to the

controller of the next sector, as would be the case in IFR flight. The plane crashed shortly after radar service ended. The complaint asserted that the controller had an affirmative duty to warn the pilot of the mountainous terrain because the plane was flying toward Lookout Mountain in bad weather conditions at an unsafe altitude. The Fifth Circuit made it clear that in such circumstances the pilot in command, who chooses to fly VFR, is responsible to maintain visual contact with obstructions.

The Biles court correctly applied the principle that controllers must be able to assume that pilots are complying with FAA regulations and understand their circumstances in the absence of a pilot request or other notice to the contrary:

> The controller had a right to assume that in the absence of evidence to the contrary, conditions were such that the aircraft could operate under visual flight rules. He would expect that out of concern for their lives, if for no other reason, the crew members were flying in conformance with FAA regulations." *Redhead*, 686 F.2d at 183. Thus, the controller, here, was entitled to assume that the pilots could see the terrain themselves. . . . The problem in this case seems to be that the pilots had taken an unwarranted risk in flying VFR and may even have misrepresented flying conditions as permitting VFR flight. "The pilot of an aircraft is in control of the flight . . . decisions that depend upon conditions known in detail only by the pilot must be made by him." Id. . . . [The controller] had no means to assume their lack of preparedness.

Biles, 848 F.2d at 663 n.4.[5]

Numerous circuits, including our own, have similarly held that under VFR conditions, the pilot has primary responsibility to avoid collisions:

> Recorded cases clearly state the legal duty, that although air traffic controllers must exercise reasonable care, "under VFR [visual flight rules] conditions, the primary responsibility for safe operation of the aircraft rests with the pilot, regardless of traffic clearance." *Coatney v. Berkshire*, 500 F.2d 290, 292 (8th Cir. 1974).

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[5]The Court then concluded: Air traffic controllers cannot be presumed to have X-ray vision and extrasensory perception. They must follow the rules and regulations that have been established by experts for their use, and we see no sign on the record before us that (the controller] deviated from the regulations. Our nation's skies are crowded to an unprecedented extent, and air traffic controllers are extremely busy. Our complex air travel system will become unsafe unless pilots themselves carefully follow prescribed flight guidelines to achieve the maximum safety in their own operations. In this case, several deviations from accepted pilot practice apparently occurred. Certainly the controller must assist even careless pilots who, based on the facts known to the controller, have placed themselves in a dangerous position. The record before us does not, however, sufficiently establish that the controller could have known that this aircraft was subject to dangerous conditions. *Id.* at 663-64.

Schuler v. United States, 868 F.2d 195, 197 (6th Cir. 1989).

A. The Conduct of Flight Specialist Ronald Kessock

The pilot had decided to fly his passengers out of the closed airport at Brown Field late at night VFR, near a mountain range. Although obviously more dangerous than daytime flight, FAA regulations permit such nighttime VFR flights. 14 C.F.R. §§ 91.151-159. While waiting at Brown Field, the pilot called the San Diego Flight Service Station at 7:20 P.M., again at 7:53 P.M. and then again at 8:25 P.M.

Defendant's expert Beaudoin, using the somewhat confusing nature of the conversations between the pilot and the flight specialist, testified that the flight specialist in this case was negligent.[6] First, Beaudoin asserted, incorrectly, that Kessock suggested that the pilot take off VFR.[7] Second,

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[6]Because the pilot and the flight specialist were intimately familiar with flight terminology and procedure, their conversations were conducted in a shorthand which was easily comprehensible to them, yet is difficult for the average person to follow.

[7]Contrary to the testimony of defendant's expert, Joseph Beaudoin, Kessock did not tell the pilot that he must leave Brown Field under visual flight rules instead of filing for a published IFR departure route. During the course of the first conversation, Kessock commented to the pilot that you can go out depart VFR" and "pick your clearance up in the air," but there is no instruction by Kessock to the pilot that he should leave VFR instead of IFR or that this was his only option. Beaudoin testified "Mr. Kessock told him (the pilot] to take off VFR." Transcript of Trial, Vol. IV, at 881.

Beaudoin testified, inaccurately, that Kessock told the pilot it would be safe to take a route to the northeast at an altitude of three thousand feet. Transcript of Trial, Vol. IV, at 802, 804. Finally, Beaudoin testified that Kessock undertook to approve the pilot's takeoff plan, and in doing so, failed to provide safe and accurate information. Id. at 804. This assertion is also inaccurate.

The transcripts of the conversations between the pilot and Kessock reveal that Beaudoin's attribution of negligence to Kessock is totally unfounded. The first two conversations lasted approximately four minutes each and the third lasted three minutes. In the first conversation the pilot filed a flight plan for departure at midnight with Amarillo, Texas, as the destination and with a cruising altitude of 37,000.[8] The flight plan further provided for a VFR takeoff from a closed field with the pilot after takeoff to check in while in the air with San Diego departure control for his clearance for a further IFR flight to his destination. In the first call, Kessock asked the pilot, "are you familiar with the Brown Field departure, sir," to which the pilot replied, "No, not really," but then said he had the necessary charts and, "I'll just look it up in the approach plates." In the first conversation, the pilot in his flight plan specified a VFR or visual departure

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Beaudoin's repeated testimony to the court and jury that Kessock negligently told the pilot to leave VFR was false and misleading. This issue was a red herring, although the jury apparently accepted Beaudoin's testimony to this effect.

[8]A pilot may generally fly under VFR flight rules up to 18,000 but above this level must fly under IFR flights and remain under the positive control of a FAA controller. 14 C.F.R. § 91.159.

from Brown Field rather than specifying a time for a designated instrument departure takeoff. (After taking off under visual flight rules, the pilot may then communicate with a FAA departure controller for clearance to fly in accordance with his instrument flight plan to his destination.)

In his second call to the San Diego Flight Service Station, the pilot said to Kessock that he was unable to find the required charts showing the departure routes from the field. The pilot was at first uncertain which way he would depart on the east-west runway at Brown Field, but he then tentatively advised Kessock that he would depart to the east on runway 8.[9] Since the pilot said he did not have the required charts showing recommended departure routes, Kessock then read the departure plate to the pilot word for word. He gave him the correct departure route for 8 to the east, including all of the radio signals and radials the pilot should follow during his climb out. The pilot indicated that he had copied and understood the departure routing. Then the pilot seems to change his mind about the runway on which he will depart. The following conversation about this matter concluded the second telephone call:

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[9] Runways are designated by compass headings. Runway 8 means the pilot will take off from the end heading 80 degrees to the east and Runway 26 means a takeoff from the opposite end heading 260 degrees to the west. Flight plans do not normally specify the runway a pilot will use for takeoff because this usually depends on the local wind conditions at the time of takeoff. Planes ordinarily take off into the wind which provides additional lift for climbing out. If the tower is open, the ground controller will designate the takeoff runway.

0756:55 Pilot Ok. What is, what is two six [meaning what is the departure routing for takeoff to the west on runway 26]?
0756:56 Kessock Ok. Two six runway two six departure climbing right turn heading 280 cross Mission Bay vortac [a radio signal] radial [compass heading from the radio signal] 130 at or above 1,500 [feet above sea level] intercept the Mission Bay Vortac radial 160 at or above 3,000 direct Mission Bay vortac.
0757:21 Pilot Ok. All right. That'll do me.

In the third telephone call to the Flight Service Station, the pilot told Kessock that he now had found the departure charts. He again said that he will be leaving in accordance with his previous flight plan and that he wants to be sure to stay below the restricted air space of the TCA which has a floor beginning at 3,000. This segment of the TCA would be immediately to the north of his departure route if he used runway 26 to the west. The pilot said near the end of this conversation, "so I would be better off if I headed right northeast and stayed down below 3,000," to which Kessock replied, "Yeah, sure, that'll be fine." At the end of the previous conversation thirty minutes earlier, the pilot had indicated that he would depart runway 26 to the west. His question to Kessock about staying below the TCA on his VFR takeoff indicates he still plans, four hours before takeoff, to depart on runway 26 to the west because he indicates after takeoff that he will be "headed right" to the "northeast" and staying below the TCA. The pilot's question would make no sense to Kessock or anyone who speaks in the vernacular of pilots if the pilot intended to leave on runway 8 to the east. It would make no sense because a pilot leaving on runway 8 headed east would not turn "right" to go northeast and because the bottom or floor of the TCA

immediately north of the runway 8 departure course was at 5,800, not 3,000 as would be the case with the segment of the TCA north of the runway 26 departure.

A review of the San Diego charts shows that the pilot could have departed to the east on runway 8 flying to 18,000 straight out using the runway heading without coming in contact with the TCA or having to remain at an altitude below the tops of any mountains in the area. It is a mystery why the pilot decided to turn left under visual flight rules after departing runway 8 to the east and fly northeast toward the mountains.

If Kessock had concluded that the pilot was confused and intended to turn left into the mountains after a takeoff from 8 to the east, he might have said, "Sir, you can avoid danger by taking off on 8 to the east and climbing straight out on runway heading to a safe altitude above the mountains." But Kessock had no reason to believe that the pilot had not read the required charts and did not know this elementary fact. Kessock gave the pilot no misinformation about the TCA, departure routes, weather or terrain. The pilot said to Kessock that he had the necessary charts, and Kessock, under standard assumptions and expectations that pilots and FAA assistants share, was entitled to assume that the pilot had read them and knew where the mountains were located in relationship to the airport.

There is no basis whatever for a finding that Kessock's conduct was negligent or a valid proximate cause of the pilot's mistakes. The argument of able defense counsel as well as the testimony of defendant's expert, Beaudoin, conflicts with the record of the conversations between the pilot and Kessock. Thus the trial judge should not have allowed this defense of comparative negligence on

the part of Kessock to go to the jury, and the jury verdict finding Kessock 27-1/2% responsible for this aircraft accident must be set aside.[10]

B. The Conduct of Departure Controller Hughes

The pilot took off on runway 8 and hit the mountain 2 to 3 minutes later. He did not contact the air traffic controller, however, until a mere forty-five seconds before the crash. Defendant's assertions that during that forty-five second span Hughes was obligated to give the pilot a clearance, determine that he was headed in an unsafe direction and give instructions such that the accident would be averted are not supported by the record. Therefore, the submission of the comparative negligence defense as to air traffic controller Hughes was also error.

In order for a plane to be come within the positive control of an air traffic controller, it must first establish radio contact.[11] Once radar contact is established, the radar sur-

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[10]It is difficult to understand how an experienced pilot with 15,000 hours and a good reputation could have made such a terrible mistake. The charts show that the mountain range he flew into was plainly marked and that there was even higher terrain immediately to the northeast. We can only speculate that the pilot somehow became disoriented at the time of takeoff due to fatigue or lack of sleep or for some unknown reason.

[11]Positive control depends on radar contact and radar surveillance of the airplane by the air controller. There is a highly elaborate and complex system of controllers, radar equipment and communications and navigational radios and

veillance system allows the controller to clear the aircraft, give the pilot instructions and warnings, and maintain physical separation between aircraft. Until radar contact is established and a clearance received from the controller, the pilot does not ordinarily receive instructions and warnings from the controller.[12] Experienced pilots are familiar with

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signals spread out across the country. In the air, the pilot does not normally come under positive control until the controller gives him a squawk and tells him that radar contact is now established. The squawk transmission from the pilot's transponder creates an image on the controller's radar screen that allows the controller to identify the airplane and follow its progress through the controller's airspace. In order to "squawk," a pilot dials into his radio transponder a four digit code, like 0306, provided by a controller. Pilots may not normally fly through TCA's or on IFR flights without a transponder which is squawking an identifying code so that the controller can identify the airplane on the controller's radar screen. 14 C.F.R. § 91.133 ("Restricted and prohibited areas. (a) No person may operate an aircraft within a restricted area (designated in part 73) contrary to the restrictions imposed, or within a prohibited area, unless that person has the permission of the using or controlling agency, as appropriate.").

[12]FAA Order 7220.2A § 30-78 describes the order in which an air traffic controller should proceed when processing airfiles (as the controller in this case was obliged to do when the pilot contacted him, 45 seconds before the crash): a. Ensure the aircraft is within your area of jurisdiction unless otherwise coordinated. b. Obtain necessary information needed to provide IFR service. Record the information on a flight progress strip, and enter

these elementary facts.

The complete communications after takeoff between the pilot and the departure controller, Jim Hughes, as shown on FAA tapes, was:

> 1:41:34 A.M. Pilot San Diego departure, eight three one lima charlie
> 1:41:43 Hughes hawker one lima charlie go ahead
> 1:41:45 Pilot yes sir this is hawker eight three one lima charlie just off brown field standing by for our ifr to amarillo
> 1:41:52 Hughes eh your clearance clocked out here let me put it right back in i'll be right back with you
> 1:42:16 Hughes one lima charlie squawk zero three zero six and ident
> 1:42:19 Pilot zero three zero six coming down

[The crash occurred a few seconds later.]

The plane crashed into the mountain between 1:42 A.M. and 1:43 A.M. The phrase, "clocked out," refers to the fact that under FAA rules in the San Diego area, a flight plan filed with the FAA is cancelled if not called up and used

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the information in the flight plan data base. Record additional information provided by the pilot on the flight progress strip or voice recorded. c. Issue clearance to destination, short range clearance, or an instruction to the pilot to contact a Flight Service Station (FSS) if you cannot process the flight plan. (emphasis added). FAA Order 7110.65 § 5-50, provides that controllers should establish and maintain radar identification of the aircraft involved, before they provide radar service, except as provided in 570b(2) and 5-70b(3).

within an hour and a half after the stated time for takeoff or check-in specified in the flight plan.[13] The pilot, in the flight plan filed with Kessock, stated that he would take off and check in while in the air at midnight. Since the FAA flight computer system had cancelled the plan by 1:41 A.M., controller Hughes--the only controller on duty at this time of night--turned around from his radar screen to re-enter the flight plan in the FAA computer system prior to establishing radar surveillance and giving the pilot a clearance and a compass heading and an altitude. While Hughes was re-entering the flight plan, he did not follow the airplane on his radar screen. He had given the pilot a squawk to put in the transponder in preparation for radar contact. But he did not see that the plane was heading to the northeast and was about to fly straight into the mountain

In order to take positive control of the aircraft and in order to be in position to hand off the plane in a few minutes to the next controller down the road for instrument flight following, Hughes was required to refile the flight plan and re-enter it into the computer system. FAA Order 7220.2A § 30-78. Hughes had to re-enter the flight plan because the pilot had not himself kept his flight plan current by updating it within an hour and a half before takeoff. In clocking the plane back into the computer, Hughes followed standard FAA procedures. *Id.*

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[13] "To ensure that a flight plan remains active, pilots whose actual departure time will be delayed 1 hour or more beyond their filed departure time, are requested to notify ATC of their departure time." December 13, 1990, Airman's Information Manual Rule 302 ("Change in Proposed Departure Time").

The defense argument that Hughes was negligent is just as off base as their argument that Kessock was negligent. First, Defense counsel and his expert witness, Beaudoin, argued below that Hughes was negligent in failing to clear the airplane immediately for instrument flight so he could follow its path. If Hughes had done so, rather than reenter the "clocked out" flight plan, he might have had time to notice that the plane was flying at an unsafe altitude and in an unsafe direction toward the mountains. Although Hughes could have given the pilot an IFR clearance after establishing his position by radar identification, Hughes was also obligated to refile the pilot's flight plan which the pilot allowed to lapse.[14] Positive control and clearance for instrument flight does not begin until a squawk is transmitted from the plane's transponder and the controller announces radar contact and provides a clearance. Airman's Information Manual Rule 325 (Note) ("Terrain/obstruction clearance is not provided by ATC until the controller begins to provide navigational guidance, i.e. Radar Vectors."). Defendant admitted that the plane was not "under the control" of Hughes at the time of the crash. Transcript of Trial, Vol. IV, at 911. Thus, the assertion that Hughes was negligent in failing to guide him away from the mountain has no basis in fact.

Second, Defendant's expert asserted that Hughes should have issued a safety warning to the pilot. This assertion is equally baseless. The Airman's Information Manual indicates that a controller "[i]ssues a safety alert to an aircraft under his control if he is aware the aircraft is at an altitude

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[14]As noted in footnote 12, when processing airfiles, Air Traffic controllers are instructed to enter the flight plan before issuing a clearance.

believed to place the aircraft in unsafe proximity to terrain, obstructions, or other aircraft." December 13, 1990 Airman's Information Manual Rule 407(b). The aircraft, as defendant admitted, was not under Hughes' control. In addition, Hughes did not know that the plane was in danger and had no reason to assume that it was.[15] Thus, there is no basis to assert that he should have issued a safety alert in this case.[16]

Taking the evidence in the light most favorable to defendant, and giving defendant the benefit of every reasonable inference, no factual basis exists for a finding of negligence on the part of Hughes and Kessock. Beaudoin's testimony to the contrary is spurious and not based on an accurate portrayal of the rules and customs of the flying community. Able defense counsel's arguments on this issue in the court below and on appeal, though emphatic, are similarly flawed. The court below erred in permitting a comparative negligence defense. The legal fault here is solely the defendant's, under the doctrine of respondeat superior. The portion of the jury verdict finding the FAA

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[15]There was no 3,000 TCA that should have been a problem for the pilot in taking off on runway 8 to the east. The pilot could have flown the plane straight up to 18,000 VFR without a clearance.

[16] Although FAA orders also instruct controllers to give first priority to safety issues, those instructions also indicate that a controller "shall exercise his best judgment based on the facts and circumstances known to him." FAA Order 7110.65F § 2.2 (emphasis added).

employees at fault must be set aside.[17]

II. The Punitive Damages Issue

In Tennessee, after the case of *Hodges v. S.C. Toof and Co.*, 833 S.W.2d 896 (Tenn. 1992), punitive damages may be awarded only for purposes of punishing the defendant in "cases involving only the most egregious wrongs." *Id.* at 901. The only function or purpose of punitive damages now in Tennessee is punishment for serious moral dereliction Gross negligence is no longer sufficient. The tort must be intentional or fraudulent or a species of recklessness that contains an element of "conscious" wrongdoing. The plaintiff under Tennessee law must show by "clear and convincing evidence" that the defendant "is aware of, but consciously disregards, a substantial and unjustifiable risk" in a reckless" way. Here the pilot was guilty of gross negligence in carrying out his piloting responsibilities. But there are several factors that militate against allowing an award of punitive damages. The plaintiff has introduced no evidence

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[17]Plaintiffs have called this Court's attention to the Tennessee Supreme Court's recent decision in Owens v. Truckstops of America, 915 S.W.2d 420 (1996). They have argued that, under Owens, a defendant tortfeasor cannot raise the defense of comparative fault of other tortfeasors who were non-parties if the plaintiff's claims against those other tortfeasors are barred by the statute of limitations. Thus, they assert, the verdicts against Kessock and Hughes must be set aside. While the Plaintiff's interpretation of Owens, if true, might provide an alternate rationale for the result reached here, we need not reach the issue. In light of this court's decision in this case, the question raised by the Owens opinion need not be decided.

that justifies punishing the defendant's conduct independently of the pilot's action. The pilot is dead and cannot be punished. The pilot was aware of the mountains and the dangers of night VFR flight into them, but the evidence is completely unclear about why the pilot became disoriented. Disorientation under such circumstances clouds consciousness and the kind of purposeful conduct implied by the malice standard now in use in Tennessee. The most likely explanation for the pilot's terrible mistake is fatigue and the pilot's lack of self-awareness of his impaired state of mental and physical alertness. But the pilot's inability to understand his own tiredness and his lack of mental and physical responsiveness—if this was the cause—is inconsistent with malice or the type of "conscious" disregard of the danger contemplated by the Hodges case. His state of mind is more likely to have been one of "unawareness" rather than "awareness" of the danger at the time of the crash. The punitive damages question may be a close one, but we agree that the court below was correct in concluding that this case should not go to the jury on punitive damages. We need not decide whether the doctrine of respondeat superior applies to punitive damages in other situations. Here there is no one still alive who, for reasons of moral dereliction, deserves punishment under Tennessee's theory of punitive damages.

III. The Comments of the District Judge on the Credibility of Plaintiff's Expert Witness on Liability

Plaintiffs' counsel argues strongly that the district judge's comments on the credibility of plaintiffs' expert witness on liability was error that pervaded the entire trial and the jury's attitude toward the plaintiffs' case.

Early in the trial, a witness, Richard Childress, testified that Joe Duncan, the owner of defendant corpora-

tion, had previously made a damaging statement in anger. Duncan's statement was that he did not ordinarily furnish VFR charts to his pilots because his business was a "god-damned jet outfit; we don't carry VFR charts." Transcript of Trial, at 247. This precise statement was already before the jury when Richard Taylor, the plaintiffs' main expert on liability, testified. The district judge told Taylor please not to repeat the word "goddamned" in quoting Duncan's previous statement. Taylor then used the word "GD" in place of the full curse word. This angered the trial judge who believed the witness had purposely disobeyed his instruction. The judge excused the jury and excoriated the witness. He then called the jury back and said to them:

> This witness demonstrated to me his partisanship. It is up to you to believe whether or not you believe him or not. It demonstrated his partisanship and lack of objectivity. I think he did that on purpose. It is up to you to decide whether or not you believe that or not.

Transcript of Trial, at 1035.

We do not know what effect this instruction had on the jury's view of the plaintiff's case, but our careful reading of the record indicates that the witness misunderstood the judge's instruction and did not intend to disobey. The district judge in this case is one of our most able and experienced federal trial judges, and we are reluctant to reject his view on a question of credibility. But our reading of the testimony indicates that Taylor was an otherwise credible, fair-minded, extremely knowledgeable, straightforward witness on the complex rules that govern pilots and their relationship to FAA assistants. Taylor has a distinguished aviation record as a pilot over many years, as a

professor of aviation science at a leading university and as an author well known in the aviation community for his many books and articles on flying.

In light of our previous disposition of the liability question, the comments of the district judge were harmless error, at least on the question of liability. Our holding that the defendant should have been held fully and solely liable for the injury to plaintiffs concludes the liability question in favor of the plaintiffs' theory of the case, as recounted in the testimony of Richard Taylor.

IV.

We have carefully reviewed the two damages issues raised by plaintiffs that the district court erred (1) in instructing the jury in awarding damages to deduct from decedent's gross income the amounts that would have been paid by the decedent for personal living expenses and income taxes and (2) in refusing to award pre-judgment interest. We believe that the district court correctly applied Tennessee law on these questions. Likewise, we regard as meritless plaintiff's argument that the case was improperly removed and should be remanded to the state court for trial. Similarly, the district court ruled correctly under Tennessee law that settlements made with the families of two other deceased passengers in the amount of $3 million and $2.2 million were inadmissible. Rule 408 of the Tennessee evidence rules clearly excludes such compromise and settlement evidence, and the Federal Rule of Evidence is similar. *See, e.g., McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir. 1985); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1235 (7th Cir. 1983).

V.

This leaves as the last question a serious issue concerning the propriety of the jury's award of total damages of $732,829 prior to making its 55% deduction for comparative fault.

The parties concede that the jury accepted in its entirety the view of defendant's expert, John Sartain, that the economic value of the deceased band leader was $732,829. The jury accepted this testimony instead of the testimony of four other experts, including another for the defendant who testified that the decedent's income would have been substantially higher than Sartain assumed. In addition, the jury made obvious errors by refusing to include in the award the decedent's substantial funeral expenses and by refusing to bring forward to the date of trial the discounted economic value of the life in question.

The worst mistake made by Sartain, and hence by the jury, however, was in relying upon an assumption that the economic value of decedent's life should be based on an average income for the last five years before his death of $59,920. The unreasonableness of this assumption is demonstrated by the fact that decedent was only 28 years old when he died and had earned as a musician an average of $98,171 for the last two years. He earned over $100,000 in income during the last year before his death. Sartain could only reach his rock bottom figures by averaging the decedent's very low earnings for the preceding five years when he was in music school and then when he was just getting started in his profession. Those early low income years reduced by almost a half the income used in the calculation of a portion of the stream of income, the discounted present value of which represents the economic evaluation of the decedent's

projected earnings. If Sartain had based his evaluation on the $98,171 figure the result would have exceeded $1.2 million. Sartain assumed that the decedent's income would have been much less for each of the next seven years than it had been for the last two years of his life. We believe that there is no justification for such an approach in the evaluation of this decedent's life. As pointed out in detail in plaintiff's briefs, Sartain's assumption is entirely inconsistent with his own chart based on empirical studies projecting the average lifetime earnings profile of college educated males.[18]

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[18]Plaintiff's reply brief at page 24 accurately explains the situation: He [Sartain] introduced as Exhibit 101 a chart showing the average age earnings profile of male full-time' workers with four years of college. The curve on this chart shows that the average worker had 40% higher earnings at age 28 than at 23 and that for every year after age 28, the income increases until age 54 and the income at age 36 is 30% higher than the income at 28. Although Sartain testified that he relied on that age earnings profile "to show how earnings change at different ages for men with college education, like with Cappello's," his conclusion that Kirk P. Cappello's 1991 income at age 28 would have been only $59,920, the average of his previous five years is in direct conflict with the earnings profile. (Ex. 101). If Sartain had relied on the earnings curve on the profile, he could not have concluded that Kirk P. Cappello's 1991 income would have reduced to his average income for the previous five years or that he would not again have equalled his 1990 income until he reached the age of 36. If he had relied on the profile, he would have concluded that Kirk P. Cappello's 1991 income would have been more than his 1990 income of $100,000 and would have increased every year until he reached 54. This would have resulted in a pecuniary value of far more than

Unfortunately, the jury in this case went far astray on both liability and damages. Thus, in accordance with this opinion, the judgment of the court below must be vacated and the case remanded to the district court with instructions that (1) the liability of the defendant has been established, and (2) the damages issue must be retried.

Accordingly, it is so ordered.

$732,829. Sartain's own testimony established that there was absolutely no justification for using $59,920 as the 1991 income of Kirk P. Cappello.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PHILLIP R. and EDNA CAPPELLO
individually and PHILLIP R.
CAPPELLO as Administrator of the
Estate of KIRK P. CAPPELLO

v. No. 3-92-0214

DUNCAN AIRCRAFT SALES
OF FLORIDA, INC.

JUDGMENT

This action came on for trial before the Court and a jury, and the issues having been duly tried, the jury duly rendered its verdict.

At the conclusion of all the proof, defendant's motion for a directed verdict on punitive damages was granted. All other motions for a directed verdict, by the plaintiffs and the defendant, were denied.

Special interrogatories were submitted to the jury in the following form, and to which the following answers were made.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PHILLIP R. and EDNA CAPPELLO
individually and PHILLIP R.
CAPPELLO as Administrator of the
Estate of KIRK P. CAPPELLO,

Plaintiffs,

No. 3-92-0214

v.

DUNCAN AIRCRAFT SALES
OF FLORIDA, INC.

Defendant.

VERDICT FORM

1.a. Was the Defendant's employee, Donald T. Holmes, negligent?

yes _X_ no ___

If you answered "yes," please answer question 1.b. If you answered "no," answer no more questions, sign this form, and return it to the Court.

1.b. Was the negligence of the Defendant's employee, Donald T. Holmes, a proximate cause of the plane accident?

yes _X_ no ___

If you answered "yes," please answer question 2.a. If you answered "no," answer no more questions, sign this form, and return it to the Court.

2.a. Was FAA employee Ronald Kessock negligent?

yes _X_ no ___

If you answered "yes," please answer question 2.b. If you answered "no," please proceed to question 3.a.

2.b. Was the negligence of Ronald Kessock a proximate cause of the plane accident?

yes _X_ no ___

3.a. Was FAA employee Franklin James Hughes negligent?

yes _X_ no ___

If you answered "yes," please answer question 3.b. If you answered "no," please proceed to question 4.

3.b. Was the negligence of Franklin James Hughes a proximate cause of the plane accident?

yes _X_ no ___

If you answered "yes" to either question 2.b or 3.b, please answer question 4.

4. Considering all of the fault that you have found above (that is, for those parties who were negligent and whose negligence did proximately cause the accident),

what percentage of the total fault is attributable to:

the Defendant	45 % (0-100%)
Ronald Kessock	27.5 % (0-100%)
Franklin James Hughes	27.5 % (0-100%)

5. State the total amount of compensatory damages, if any. (Do not attempt to adjust the amount of damages to reflect the percentage of fault which you have assigned to the defendant or to any third party.)

Total compensatory damages: $732,829

/s/Robert M. Bone
Foreperson

Dated: 2-11-94

Thereupon the jury was polled and each juror affirmed the verdict as being his or her individual verdict.

Judgment is accordingly rendered in favor of the plaintiffs in the amount of 45% of $732,829.00 or $329,773.05.

/s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.,
USDJ

No. 94-5543

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Phillip R. Cappello, suing individually and as Administrator of the Estate of Kirk P. Cappello; Edna Cappello, Individually,	)	
Plaintiffs-Appellants,	)	ORDER
v.	)	June 3, 1996
Duncan Aircraft Sales of Florida, Inc.,	)	
Defendant-Appellee.	)	

Before: MERRITT, Chief Judge; MARTIN, Circuit Judge; and SIMPSON,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

---

*Hon. Charles R. Simpson, Chief United States District Judge for the Western District of Kentucky, sitting by designation

Respectfully submitted,

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No. 96-341

Supreme Court, U.S.
FILED
OCT 9 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

DUNCAN AIRCRAFT SALES OF FLORIDA, INC.,

Petitioner,

vs.

PHILLIP R. and EDNA CAPPELLO, Individually, and PHILLIP R. CAPPELLO, as Adminstrator of the Estate of KIRK P. CAPPELLO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Duncan Aircraft Sales of Florida, Inc. states on page i of its petition that the question presented is:

> Whether the federal aviation regulations which give pilots responsibility for safety of aircraft alleviate any concurrent responsibility of air traffic controllers to assist pilots operating under visual flight rules with terrain avoidance.

That question is a misstatement. That question was not an issue in the appeal in the Court of Appeals and would not be an issue before the Supreme Court if certiorari is granted. The judgment of the Court of Appeals sought to be reviewed did not hold that the federal aviation regulations which give pilots responsibility for safety of aircraft alleviate any concurrent responsibility of air traffic controllers to assist pilots operating under visual flight rules with terrain avoidance. The Court of Appeals expressly found that "no factual basis exists for a finding of negligence on the part of Hughes," the air traffic controller. (Opinion, Petitioner's Appendix, p. 21).

If certiorari is granted, the questions that would properly be before the Court are as follows:

(1) Whether under Tennessee law the district court erred in submitting to the jury the issue of comparative fault on the part of air traffic controller Hughes when comparative fault was not pled as a defense by Petitioner and prior to the time comparative fault was adopted as a new defense under Tennessee law, the statute of limitations had barred any claim Respondents had against Hughes.

(2) Whether the factual findings of the Court of Appeals that air traffic controller Hughes did not see that the plane was about to fly into a mountain and did not know it was in danger and that no factual basis exists for a finding of negligence on the part of Hughes were erroneous.

(3) Whether the Court of Appeals misapplied the rule of law that, in the absence of evidence to the contrary, air traffic controllers may assume that a pilot flying VFR has complied with applicable FAA regulations.

LIST OF PARTIES

On page ii of its petition, Petitioner states that it has no parent companies or subsidiaries "within the meaning of Supreme Court Rule 29.1." That reference should have been to Supreme Court Rule 29.6, not 29.1.

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties iii

Table of Contents iv

Table of Citations v

Response in Opposition to Petition for Writ of Certiorari 1

Statement of Jurisdiction 1

Statutes, Rules and Regulations Involved 1

Abbreviations 2

Statement of the Case 3

Reasons for Denying the Writ 9

A. The Court's decision does not contradict congressional policy under the Federal Aviation Act of 1958. 10

B. This case does not involve a question of law which is unsettled. 11

C. The Court of Appeals' decision in this case is correct. 11

Contents

Page

D. Even if there had been evidence that Hughes was negligent, the defense of comparative fault of Hughes should not have been submitted to the jury. 15

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995) 11

McIntyre v. Ballentine, 833 S.W.2d 52 (Tenn. 1992) ... 15

Owens v. Truckstops of America, 915 S.W.2d 420 (1996) 15, 16

Redhead v. United States, 686 F.2d 178 (3d Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983) 14, 16

Todd v. United States, 384 F. Supp. 1284 (M.D. Fla.) ... 11

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 1

T.C.A. § 28-3-104 2

Contents

	Page
T.C.A. § 28-3-104(a)(1)	15
Rules Cited:	
Fed. R. Civ. Proc. 8(c)	2, 15
Fed. R. Civ. Proc. 50(a)	5
Tenn. R. Civ. Proc. 8.03	2, 15
Other Authorities Cited:	
14 C.F.R. § 91.3	7
14 C.F.R. § 91.13	7
Airmen's Information Manual Rule 325	1
Airmen's Information Manual Rule 325(b)(5)(a)	2, 7
Airmen's Information Manual Rule 407(a)	7
Airmen's Information Manual Rule 407(b)	1
Section 5-50 of the FAA Air Traffic Control handbook, 7110.65	12

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Phillip R. Cappello and Edna Cappello request that the Court deny the petition of Petitioner Duncan Aircraft Sales of Florida, Inc. for writ of certiorari seeking review of the judgment of March 27, 1996 by the United States Court of Appeals for the Sixth Circuit. The opinion of the Court of Appeals is reported at 79 F.3d 1465. The judgment of the United States District Court for the Middle District of Tennessee is dated February 15, 1994. (Judgment, Petitioner's Appendix, pp. 29-32).

STATEMENT OF JURISDICTION

Respondents originally filed this case in a Tennessee state court seeking damages for the wrongful death of their son. The case was removed to the United States District Court because that court had jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332. On June 3, 1996, the Court of Appeals denied the Petitioner's petition for rehearing the judgment of March 27, 1996. The Supreme Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Airmen's Information Manual Rule 325. Note: "Terrain/obstruction clearance is not provided by ATC until the controller begins to provide navigational guidance, i.e. Radar Vectors."

Airmen's Information Manual Rule 407(b) December 13, 1990. A controller "[i]ssues a safety alert to an aircraft under his control if he is aware the aircraft is at an altitude

believed to place the aircraft in unsafe proximity to terrain, obstructions, or other aircraft."

Airmen's Information Manual Rule 325(b)(5)(a). "When climbing in visual conditions it is the pilot's responsibility to see and avoid obstacles.

T.C.A. § 28-3-104. Personal tort actions. — "(a) The following actions shall be commenced within one (1) year after the cause of action accrued:

(1) Actions . . . for injuries to the person . . ."

Tenn. R. Civ. Proc. 8.03 Affirmative Defenses: "In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute . . . comparative fault (including the identity or description of any other alleged tortfeasors).

Fed. R. Civ. Proc. 8(c) Affirmative Defenses. "In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."

ABBREVIATIONS

The following abbreviations are used in this response:

AIM	Airmen's Information Manual
C.F.R.	Code of Federal Regulations
Dkt.	Docket Entry
Ex.	Exhibit

FAA	Federal Aviation Administration
FAR	Federal Aviation Regulation
IFR	Instrument Flight Rules
Joint App.	Joint Appendix in Court of Appeals
TCA	Terminal Control Area
VFR	Visual Flight Rules

The pages in the seven volumes of the transcript of proceedings are preceded by the number of the volume, I through VII, containing the pages referred to.

References to pleadings, motions and orders are to docket entry numbers.

STATEMENT OF THE CASE

Respondents sued Petitioner for damages for the wrongful death of Respondents' son, Kirk P. Cappello, arising from the crash of an airplane owned by Petitioner and operated by its employee, Donald T. Holmes, the pilot. Respondents' case was originally filed in the Circuit Court of Davidson County, Tennessee, on January 22, 1992. On March 3, 1992, the case was removed from the state court to the United States District Court for the Middle District of Tennessee.

Respondents' son, Kirk P. Cappello, was killed on March 16, 1991 at 1:42:19 a.m. when Petitioner's airplane piloted by its pilot crashed into a mountain 3,566 feet high 2 minutes after it took off flying under visual flight rules ("VFR"). Respondents' son and the nine other occupants of the plane

were killed. (I 98-99, 109; II 207-211). Respondents' son was 28 years of age and the band leader for Reba McEntire's band.

The pilot Holmes contacted air traffic controller Hughes for the first time at 1:41:34 a.m. At 1:41:45, Holmes informed Hughes that he was "standing by for ifr to amarillo." At 1:41:52, Hughes told Holmes his clearance had clocked out and that he would "be right back" with him. At 1:42:16, Hughes asked Holmes to identify himself. At 1:42:19, when Holmes was identifying himself, the plane crashed.

The crash occurred 34 seconds after Holmes first asked Hughes for IFR clearance. Positive control and clearance for instrument flight does not begin until the controller announces radar contact. Petitioner admitted that the plane was not under the control of Hughes at the time of the crash. The location and altitude of the plane did not appear on Hughes' radar screen. Hughes did not see that the plane was about to fly into the mountain and he did not know that the plane was in danger and he had no reason to assume that it was. All those facts were established by undisputed evidence. The Court of Appeals held: "Taking the evidence in the light most favorable to defendant, and giving defendant the benefit of every reasonable inference, no factual basis exists for a finding of negligence on the part of Hughes . . . ." (Opinion, Petitioner's Appendix, p. 21).

On page 6 of its petition, Petitioner states that "the record does not support, all facts as stated" in the opinion of the Court of Appeals. That statement is incorrect. All the facts stated in the opinion of the Court of Appeals were proved by undisputed evidence. Petitioner does not point out any fact stated in the opinion of the Court of Appeals that is not supported by the record and does not cite evidence in the record that contradicts any fact stated in the opinion of the Court of Appeals.

Respondents' complaint and all amendments thereto allege that the wrongful death of their son was the direct and proximate result of the negligence of Petitioner's pilot Holmes in flying the plane into the mountain. (Dkt. nos. 5, 53). The only answer Petitioner filed did not plead comparative fault of controller Hughes or of any non-party as a defense (Dkt. no. 21) and the final pretrial order did not plead or mention the defense of comparative fault. (Dkt. no. 93).

The case was tried before a jury during the period from January 18, 1994 through February 11, 1994. The district court denied Respondents' motion pursuant to Fed. R. Civ. Proc. 50(a) for judgment as a matter of law that Petitioner's pilot Holmes was 100% negligent and that his negligence was the proximate cause of Kirk Cappello's death and, over Respondents' objection, submitted the issue of comparative fault of Hughes and flight service specialist Kessock to the jury. The jury returned a verdict that Petitioner was 45% negligent, Hughes 27.5% negligent and Kessock 27.5% negligent. The jury found that the total compensatory damages were $732,829. Respondents were awarded judgment of $329,773.05, which was 45% of the total damages. (Dkt. nos. 187-188).

On appeal by the Respondents, the Court of Appeals reversed the finding that Petitioner was only 45% negligent and held that there was no factual basis for a finding of negligence on the part of FAA controller Hughes or flight specialist Kessock and stated:

> The court below erred in permitting a comparative negligence defense. The legal fault here is solely the defendant's, under the doctrine of respondeat superior. The portion of the jury verdict finding the FAA employees at fault must be set aside.

(Opinion, Petitioner's Appendix, pp. 21-22). Petitioner has not raised a question as to the ruling by the Court of Appeals setting aside the verdict that Kessock was at fault.

The Court of Appeals further stated in footnote 17 that Respondents' contention that the verdicts as to Kessock and Hughes must be set aside because Petitioner was not entitled to raise the defense of comparative fault of other tortfeasors who were non-parties need not be decided because the verdicts as to Kessock and Hughes were set aside for other reasons. (Opinion, Petitioner's Appendix, p. 22).

The Court of Appeals set aside the jury's award of total damages of $732,829 because it was not justified by the evidence. (Opinion, Petitioner's Appendix, pp. 26-27). Petitioner has not raised a question as to the ruling by the Court of Appeals setting aside the verdict as to the amount of damages.

The Court of Appeals ordered the judgment of the district court vacated and the case remanded to the district court with instructions that the liability of Petitioner has been established and that the damages issue must be retried. (Opinion, Petitioner's Appendix, p. 28). Petitioner's petition for rehearing and en banc suggestion was denied by order of the Court of Appeals of June 3, 1996 which stated: "... no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel" and the issues raised in the petition were fully considered upon the original submission and decision of the case." (Order, Petitioner's Appendix, pp. 33-34).

The statement on pages 6 and 7 of the petition that Hughes refused to issue immediate IFR clearance to Holmes and chose

instead to reenter the flight plan into the computer is not accurate. Hughes was required by FAA order 7220.2AS30-78 to reenter the flight plan which had been cancelled because Holmes did not take off within an hour and a half after his stated time for takeoff. (Opinion, Petitioner's Appendix, p. 19).

The statement on page 7 of the petition that Hughes did not check the screen to verify the aircraft's position, direction and altitude is misleading. It was established by undisputed evidence that the aircraft's altitude never appeared on Hughes' radar screen. (III 715-716).

The statement on page 8 of the petition that the Court of Appeals said that apportionment of responsibility to Hughes was error because a pilot flying VFR is not under the control of air traffic controllers and has sole responsibility to maintain eye contact with the ground and avoid obstructions is misleading. The Court of Appeals stated that Petitioner's pilot Holmes had chosen to take off at night under visual flight rules and then stated:

> He was therefore not under the direction or control of an FAA controller, and consequently, he had received no radio instructions or clearances before the crash. Under these circumstances of VFR flight, as explained in more detail below, the pilot in command had the sole responsibility to maintain eye contact with the ground and to avoid obstructions.

Citing 14 C.F.R. § 91.3; 14 C.F.R. § 91.13; Airman's Information Manual Rule 407(a) and Rule 325(b)(5)(a). (Opinion, Petitioner's Appendix, p. 2). In that portion of its opinion, the court did not mention apportionment of

responsibility to Hughes or say that it was error to apportion responsibility to Hughes because the pilot had the sole responsibility to maintain eye contact with the ground and avoid obstructions. Later in its opinion, the Court stated that the apportionment of liability to Hughes was error because it was established by undisputed evidence and admissions by Petitioner that during the 45 seconds between the time Holmes contacted Hughes and the crash, Hughes did not see that the plane was about to fly into a mountain, the plane was not under the control of Hughes and Hughes did not know the plane was in danger and had no reason to assume that it was and, therefore, "no factual basis exists for a finding of negligence on the part of Hughes. . . ." (Opinion, Petitioner's Appendix, pp. 18-21).

The statements on page 8 of the petition that the court acknowledged that if Hughes had not turned around to retype the flight plan he would have had time to notice that the aircraft was flying toward mountains at an unsafe altitude and that the aircraft was clearly visible on Hughes' radar screen are incorrect. The undisputed testimony of Petitioner's witness Hughes was that he could not see the plane's altitude on the radar screen because, after giving a squawk, the antenna has to "see that aircraft three times before it will acquire" and "that never happened" and he never had an opportunity to observe that altitude. (III 715-716).

The statement on page 8 of the petition that the court decided that Hughes' duty to retype Holmes' flight plan outweighed any duties that FAA regulations might otherwise impose on him to watch his radar screen is not correct. The court's opinion does not contain any such decision.

REASONS FOR DENYING THE WRIT

The argument beginning on page 9 of the petition cites numerous publications that are not in the record in this case. The facts which Petitioner claims are established by those publications which are outside the record cannot be considered as supporting Petitioner's contentions. Since Petitioner's contentions are based on those facts which are not established in the record in this case, Petitioner's contentions must fail.

Despite Petitioner's incorrect assertions to the contrary, the Court of Appeals did not decide that an air traffic controller could perform a low priority administrative task rather than assume control of an aircraft; the controller did not have ready access to any information of imminent danger to the aircraft; and the court did not decide that air traffic controllers do not have any concurrent duty to assist pilots in terrain avoidance. Petitioner does not point out any statement in the opinion indicating that the court made those decisions.

Petitioner's pilot Holmes had caused his flight plan to clock out in the FAA computer because he failed to take off within an hour and a half of the departure time stated in his flight plan. (Ex. 87; V 1040-1041). Holmes did not ask Hughes for IFR clearance until 34 seconds before the crash. Holmes never told Hughes of the location of his aircraft, the direction it was flying or its altitude or location and never asked Hughes for information about terrain. He never told Hughes that he was not looking in the direction he was flying the plane or that he did not know of the height and location of the mountain in the vicinity of the plane. At 1:42:16 a.m., Hughes asked Holmes to identify himself and three seconds later the crash occurred. (Ex. 34; Joint App. 967; III 589). Hughes, who was the Petitioner's own witness, testified that the plane's altitude never appeared on his radar screen and that he never had an opportunity to observe or

monitor the plane's altitude. That testimony was undisputed. (III 715-716). There was no evidence that the plane's altitude or that it was flying toward the mountain ever appeared on the radar screen or that Hughes could have learned in that 34-second period that the plane was flying at a low altitude toward the mountain.

There is no message in the Court of Appeals' decision opposite to a "safety first" policy with regard to the FAA's regulation of aviation as incorrectly asserted on page 10 of the petition. There is nothing in the decision that places FAA air traffic controllers beyond responsibility for accidents by VFR pilots within their sector. The Court of Appeals did not strike down an incentive for air safety. The Court of Appeals' decision promotes safety because it put the responsibility for the death of Kirk P. Cappello on Petitioner's pilot Holmes where it belongs.

The Court of Appeals' conclusion does not contradict policy concerns underlying congressional regulations or the regulations of the Air Traffic Control Manual. The decision does not contradict legislation and administrative regulation of air traffic. It does not promote bad policy and is not wrong. The Court of Appeals' decision is in accordance with applicable legislation and regulation pertaining to air traffic and is correct and follows the applicable laws and regulations as applied to the facts in this case based on undisputed evidence.

A. The Court's decision does not contradict congressional policy under the Federal Aviation Act of 1958.

The Court of Appeals did not say that a controller may disregard the safety of VFR aircraft in their sector and the Court did not condone FAA decisions to put safety second as incorrectly asserted on page 12 of the petition. It would have

made no difference if Hughes had watched the radar screen for the entire 34 second after Holmes asked for clearance since there was never anything on the screen to indicate that the plane was in danger or that it was approaching a mountain.

B. This case does not involve a question of law which is unsettled.

In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995), cited by Petitioner is not in conflict with the decision in the instant case. In *Greenwood*, the planes that collided appeared on the FAA radar screen and the court pointed out that since the controller could see both planes on his radar scope, he had a duty to issue a warning to prevent the collision. In the instant case, it was established by undisputed evidence of Petitioner's own witnesses that the position and altitude of the plane never appeared on the controller's radar screen and that the plane was never under the direction or control of the FAA controller. (III 715-716; Opinion, Petitioner's Appendix, p. 2). Since the mountain was in plain view, Holmes was in a position to see it by looking in the direction the plane was headed. Therefore, the danger that was obvious to the pilot was not "equally obvious" to the controller as in *Todd v. United States*, 384 F. Supp. 1284 (M.D. Fla.).

Since the Court of Appeals did not make any ruling that absolves air traffic controllers from their duties imposed by statutes and regulations to issue warnings to pilots, there is no conflict between the decision of the Court of Appeals and the decisions in the other cases cited by Petitioner on pages 13 and 14.

C. The Court of Appeals' decision in this case is correct.

The Court of Appeals' holding that Hughes was not

negligent was not based on the conception that Holmes' duties absolved Hughes from any responsibility as incorrectly asserted on page 15 of the petition. The petition correctly states that the Air Traffic Control Manual requires controllers to issue a safety alert to an aircraft if they are aware that the aircraft is within unsafe proximity to terrain. The petition fails to mention that in the instant case it was established by undisputed evidence that the controller Hughes was never aware that the plane was within unsafe proximity to terrain or that it was flying at a low altitude toward a low mountain.

Hughes was required by Section 5-50 of the FAA Air Traffic Control handbook, 7110.65 to "establish and maintain radar identification of the aircraft" before he was to "provide radar service". (Ex. 93; VI 1385). To do that, Hughes was required to refile Holmes' flight plan into the computer (which Holmes' negligence caused to be "clocked out") and then obtain a radar beacon code assignment to facilitate proper identification of the plane. (Ex. 97; VI 1395). This is what Hughes was in the process of doing. The process was never completed for Holmes to be under Hughes' "control" because the crash occurred. (VI 1388, 1395).

The Court of Appeals' opinion did not view as mutually exclusive the federal regulations that govern the responsibilities of pilots and the regulations that govern the duties of air traffic controllers as incorrectly asserted on page 17 of the petition. The undisputed evidence established that controller Hughes was not guilty of any violation of any regulation or of any act of negligence. The statement on page 18 of the petition that the Court of Appeals concluded that "when a pilot is negligent an air traffic controller cannot be negligent as a matter of law" is not correct. The Court of Appeals never expressed or arrived at that conclusion.

The statement on page 19 of the petition that Hughes "turned his back to the radar screen for at least two minutes in order to perform a secondary task solely for his own convenience" is not supported by any evidence and is directly contrary to the undisputed evidence in the record. As pointed out by the Court of Appeals, there were only 45 seconds between the time Holmes first contacted Hughes and the time the plane crashed and there were only 34 seconds from the time Holmes first asked for clearance until the crash. (Opinion, Petitioner's Appendix, p. 18). Hughes had no reason to believe that the plane was in danger because Holmes never told Hughes of the plane's direction and altitude and they never appeared in the radar screen.

The statement on page 20 of the petition that if Hughes had fulfilled his priority duty, he would have issued a clearance immediately and the aircraft would never have been in danger is incorrect and contrary to the undisputed evidence in the record. There was no evidence that Hughes knew the plane was in danger or that Hughes could have known that the plane was not at a higher altitude than the mountain. (III 715-716, 746-748). Holmes did not need any clearance to fly above the mountain that was only 3,566 feet high. He could have flown to an altitude of 18,000 feet without any clearance. (Ex. 42A, 70). As pointed out by the Court of Appeals, "The pilot could have flown the plane straight up to 18,000 VFR without a clearance." (Opinion, Petitioner's Appendix, p. 21).

The assertion on page 20 of the petition that the Court of Appeals "reasoned that since Hughes was not looking at the radar screen, he had no duty to issue an alert" and that if he had looked at the screen Hughes "would have seen the potential danger to the aircraft" is incorrect and directly contrary to the undisputed evidence that there was never anything on the radar screen that would have indicated to Hughes that the plane was in danger. The Court of Appeals found:

> The aircraft, as defendant admitted, was not under Hughes' control. In addition, Hughes did not know that the plane was in danger and had no reason to assume that it was. Thus, there is no basis to assert that he should have issued a safety alert in this case.

(Opinion, Petitioner's Appendix, p. 21).

Petitioner's president, Mr. Duncan, testified that Holmes was flying VFR at all times which means "looking out the window, that's visual, that's right" and that required the pilot to look ahead to avoid hitting obstructions or terrain. (III 590-591).

Redhead v. United States, 686 F.2d 178 (3d Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), is directly in point. In that case in which the controller actually had radar contact with the plane and monitored it, the court held at 686 F.2d 183:

> The controller had a right to assume that, in the absence of evidence to the contrary, conditions there were such that the aircraft could operate under visual flight rules.
>
> * * *
>
> The controller was in no better position to inform the pilot about the weather than the pilot was himself. It is not negligence not to repeat information already given or that is already known to the pilot. *Spaulding v. United States*, 455 F.2d at 227.

D. Even if there had been evidence that Hughes was negligent, the defense of comparative fault of Hughes should not have been submitted to the jury.

On the appeal to the Court of Appeals, Respondents contended that the defense of comparative fault of Hughes should not have been submitted to the jury because Petitioner never raised the affirmative defense that Hughes was guilty of comparative fault in an answer or pretrial order as required by F.R.C.P. 8(c) and T.R.C.P. 8.03 and because on May 4, 1992, when the Tennessee Supreme Court adopted comparative fault as a new defense in *McIntyre v. Ballentine,* 833 S.W.2d 52 (Tenn. 1992), the Tennessee one-year statute of limitation T.C.A. § 28-3-104(a)(1) had barred any claims Respondents had against Hughes and to allow Petitioner to benefit from the comparative fault of Hughes violates the Respondents' rights to due process under the Tennessee Constitution and the United States Constitution. Respondents cited *Owens v. Truckstops of America*, 915 S.W.2d 420 (1996), in support of that position. In regard to that contention, the Court of Appeals stated:

> Plaintiffs have called this Court's attention to the Tennessee Supreme Court's recent decision in Owens v. Truckstops of America. They have argued that, under Owens, a defendant tortfeasor cannot raise the defense of comparative fault of other tortfeasors who were non-parties if the plaintiff's claims against those other tortfeasors are barred by the statute of limitations. Thus, they assert, the verdicts against Kessock and Hughes must be set aside. While the Plaintiffs interpretation of Owens, if true, might provide an alternate rationale for the result reached here, we need

> not reach the issue. In light of this court's decision in this case, the question raised by the Owens opinion need not be decided.

(Opinion, Petitioner's Appendix, p. 22, footnote 17).

Therefore, if certiorari is granted, it would be necessary for the Court to determine whether under Tennessee law the district court erred in submitting to the jury the issue of comparative fault of Hughes when comparative fault was not pled as a defense by Petitioner and prior to the time comparative fault was adopted as a new defense under Tennessee law, the statute of limitations had barred any claim Respondents had against Hughes. The Tennessee Supreme Court in *Owens v. Truckstops of America, et al.* has decided that question as a matter of Tennessee law in favor of Respondents' contention and held that a defendant tortfeasor cannot raise the defense of comparative fault of other tortfeasors who were non-parties if the plaintiff's claims against those other tortfeasors are barred by the statute of limitations.

CONCLUSION

There is no compelling reason for granting certiorari in this case. The decision of the Court of Appeals is not in conflict with the decision of another United States Court of Appeals on the same matter. The Court of Appeals has not departed from the accepted and usual course of judicial proceeding. The error asserted by Petitioner consists of factual findings which Petitioner claims were erroneous but those factual findings are supported by undisputed evidence and admissions of Petitioner. The petition for writ of certiorari should be denied as in the similar case of *Redhead v. United States*, 686 F.2d 178 (3d Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

Respectfully submitted,

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